No. 9527

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In the
United States
Circuit Court of Appeals
For the Ninth Circuit

GILA VALLEY IRRIGATION DISTRICT, FRANKLIN IRRIGATION DISTRICT, ROY A. LAYTON, MILTON LINES, WILLIAM WALDRON, ROY D. WILLIAMS, and J. D. WILKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief

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STATEMENT

Appellees statement, as it relates to the issues on this appeal, is approximately correct. However, the impression gained from reading it, to one not familiar with the facts, would be that the decree was such as might be rendered in the ordinary case based upon a trial and adjudication of the relative rights of the parties to use the water of the river. Such an impression

would be misleading as to this case. The entire decree is the result of a compromise, and, to be properly understood, account must be taken of the circumstances surrounding the parties at the time the decree was framed by them and what they were trying to accomplish. There was never anything in the nature of a trial, nor was this decree framed by the court. It is simply a contract entered into between the parties in the form of a decree, which, at the request of the parties, the court accepted and signed. This is apparent from the stipulation entered into by counsel for the respective parties ,appearing on the page immediately following page 113 of the decree (Abs. Rec. Vol. II). In that stipulation the parties say that they "inform the court that they have reached a settlement of the issues in this cause and have adjusted and settled their respective claims as between each other; that they have set up in the within and foregoing decree the respective rights of all parties hereto, and request the court to adopt said decree as its finding * * *."

As illustrative of our criticism of plaintiff's statement and the impression created by it, we call the court's attention particularly to the following statement appearing on pages 4 and 5 of appellee's brief:

> "The decree adjudicated to the United States extensive rights to divert the natural flow of the river at points which with one exception are below the reservoir (Arts. V, VI: Decree 12-105; Appendix 2-18). One such right, decreed to the United

States on behalf of the Pima Indians of the Gila River Reservation for the irrigation of 35,000 acres, is of immemorial priority (Art. VI (1): Decree 86; Appendix 8). It is, therefore, prior to all other rights on the river."

As a matter of fact, there was no *adjudication* in the ordinary sense of extensive rights to the United States. There was an agreement that the United States might exercise certain rights which was based upon the corresponding agreement as to certain rights of these defendants. Furthermore, the statement that such rights are therefore prior to all other rights on the river is misleading, for the reason that any prior rights conceded to the plaintiff were subject to corresponding rights on the part of these defendants, including the right to disregard plaintiff's rights in certain circumstances.

It is also said (bottom page 5 of plaintiff's brief) that "the rights of all parties to the decree are adjudicated and set out in Article V." This again is misleading. Article V is the priority schedule. The rights of the parties cannot be determined from this article alone. It merely establishes priorities which can be used only subject to the rights of the various parties subsequently set out in the decree.

ARGUMENT

Plaintiff's argument is opened with the following statement (Appellee's Br., p. 12):

> 'In making additional apportionments, the Commissioner must take into consideration only such water as flows into the reservoir and is added to the available stored water."

This statement begs the real question of the case. What is available stored water? In an effort to bolster the contention that available stored water is only such water as runs into the reservoir and is permitted to remain there and raise the level of the lake, counsel for appellee assert that the controlling provision of the decree is a part of Paragraph 2, Article VIII, which they quote on pages 13 and 14 of their brief. This quoted provision is not in any sense a controlling portion of the decree. The controlling part of the decree with respect to this controversy, is the first paragraph of Article VIII, in which it is agreed that the Upper Valley Users shall be permitted to irrigate their lands to the extent which said lands have theretofore been irrigated. What follows that provision in Paragraph 2 is merely the means of carrying the controlling provision into effect, and must be construed so as to give effect to the agreement of the parties, which is that the Upper Valley Users may use the waters of the stream in disregard of the plaintiff's rights.

It is further stated, on page 14 of Appellee's Brief, that the provision in Paragraph 2 of Article VIII that

"water shall flow into said reservoir and shall be stored there and become added to the available stored water in said reservoir," clearly shows that water must be left in the lake and raise the level of it in order to entitle the Upper Valley Users to an apportionment, and that to constitute an "accession or newly available stored water supply" there must be an increase in the total amount of water left stored in the reservoir. It will be noted that there is no provision in the quoted language, or elsewhere in Paragraph 2, that the water running into the reservoir must be left there so as to raise the level of the lake. It simply provides: (1) that water must flow into the reservoir. Everyone must concede that water flowing down the river and entering the reservoir does flow into it. The next requirement (2) is that the water running in "shall be stored there." Clearly any water running into the reservoir is stored there. Under the circumstances, the identical water coming in could not be then taken out. If water is taken out at the same time, it is water that has already been stored, and not the water that is running in. The incoming water goes into storage and the mere fact that an equivalent amount is at the same time taken out does not prevent the incoming water from being stored. The last requirement, (3) that the water coming in must "become added to the available stored water in said reservoir," is also met. Any water running into the reservoir, when its level is above the point of dead storage and not running over the top of the dam, becomes added to the wa-

ter already stored in the reservoir. Had it been intended that only water which raised the level of the lake was to be considered as stored water, it would have been a simple matter to have so stated, and the quoted language, on page 15 Appellee's brief, would have read:

> Water shall flow into said reservoir and shall be stored there and become added to the available stored water in said reservoir *so as to raise the level of the water in the reservoir.*

If Appellee's contention in this respect is correct, the Lower Valley Users, including the plaintiff, would be entitled to take all of the water running into the reservoir as quickly as it came in, and prevent a rise of the lake level and a consequent apportionment to the Upper Valley Users, so long as what they took was not in excess of the amount necessary to properly irrigate 80,000 acres. At least half of this 80,000 acres is junior in right to the lands of the Upper Valley Users. Such a construction would mean that the Upper Valley Users had conceded a priority, so far as their rights to apportionments were concerned, to not only the Indian lands, but also to an amount of White lands equal to the entire Upper Valley project. It is not conceivable that this could have been intended. Throughout Article VIII of the decree, in numerous instances it is provided that the Upper Valley Users may divert the water in "disregard" of the rights of plaintiff. Nowhere in the decree is plaintiff or any other party authorized to disregard the rights of the Upper Valley Users.

Appellee further argues (page 14, Appellee's Br.) that "there is no foundation for appellant's contention that all water which flows into the reservoir is to be made the basis of additional apportionments." In support of this statement, authorities are cited to the effect that water which flows into a reservoir constructed in the channel of a stream does not necessarily become stored there, and that the owner of the reservoir must allow sufficient natural flow to pass through his reservoir to satisfy the prior rights of down-stream appropriators. These authorities might be correct as an abstract proposition of law, but we are not concerned with them here. This case is based upon the agreement of the parties and not upon what the law would be had no such agreement been made. Here it was agreed that the Upper Valley Users might use the water in disregard of plaintiff's prior rights, and we are consequently not concerned with what the rights of the parties might have been had the agreement not been made.

The plaintiff concedes (page 16 Appellee's Br.) that it has no right to store water available to it under its natural flow priorities. This being the law, we challenge counsel for plaintiff to point out a single instance wherein, under their construction of the decree, the Upper Valley Users are permitted to use water in disregard of plaintiff's rights. If the priority schedule, set up in Article V of the decree, is the controlling factor, and the Upper Valley Users are entitled to use water only in accordance with the priorities therein set up, they could

never use any water so long as the amount in the stream was not more than sufficient to supply the needs of plaintiff, and whenever plaintiff permitted its water to be stored, so as to raise the level of the reservoir, the Upper Valley Users would have the right to use the water on their priorities without the necessity of any provision in the decree authorizing them to do so. In other words, under appellee's construction, there would never be an instance where the Upper Valley Users were using the water in "disregard of plaintiff's rights" and the provisions of Article VIII of the decree would be wholly unnecessary.

In support of the argument made on pages 16, 17 and 18 of Appellee's brief, to the effect that Article V is the controlling factor in the decree, and that plaintiff has a right to satisfy its priorities out of the natural flow of the stream, rather than out of stored water, a portion of Article VI of the decree is quoted (page 17 of the brief), which relates to the diversion of the water by plaintiff at the Ashurst-Hayden and Sacaton diversion dams. The quoted portion states that the water diverted there shall be for the supplementation of the amounts available at such dams from the natural flow of the stream. In order to explain this language, it is called to the court's attention that a large amount of water comes into the river below the dam from tributaries, namely, the San Pedro River and Arivaipa Creek and other tributaries, which water is diverted by plaintiff at the Ashurst-Hayden and Sacaton diversion

dams. Of course, this water, which has never been in the Coolidge Reservoir, is natural flow water and the reference made to the "natural stream flow" in this portion of the decree clearly has reference to this water coming into the river below the Coolidge Dam and above the diversion dams.

A similar reference is made (page 18 of the brief) to a portion of Article X of the decree, which is quoted. This language has reference to the water diverted by Anderson, Herring and Glasspie. Their rights must, of course, be measured by the natural flow of the stream since they would not have the right to share in stored water belonging to the plaintiff. However, it is significant that a means of determining what is the natural flow at the point of their diversion is set up in the decree in connection with the rights of those defendants, and it is the only place in the decree where an attempt is made to define the natural flow. The reason is apparent. It is because the plaintiff is not satisfying its rights out of the natural flow, in so far as the waters coming from the Coolidge Reservoir are concerned, and hence there is no necessity of a definition with respect to those rights of plaintiff.

The necessity for Article VIII of the decree and the reasons why it must be construed as we contend are apparent when the circumstances surrounding the framing of the decree are considered. This litigation had been pending a long time before the agreement resulting

in the decree was reached. Plaintiff had been contending, on behalf of the Indians, that it had prior rights to the water for an extensive area. These defendants were contending that they had used the water uninterruptedly for more than fifty years, and that the Indians had no rights superior to their own. There was never an adjudication and decision on these respective contentions. Further, at that time the government had an agreement with the White settlers in the Lower Valley, most of whose rights were conceded to be junior to the rights of the Upper Valley Users, whereby they were dividing the waters with the White settlers. It is apparent, therefore, that a decree could never have been rendered without the consent of all the parties, permitting the government to carry that agreement into effect. What the parties did was to follow the direction of the Secretary of the Interior and arrive at an agreement whereby the Upper Valley Users could continue to use the water to the extent they had theretofore used it. Such an agreement was made and is now before the court in the form of this decree. As we have repeatedly pointed out, the agreement cannot be put into effect except under the construction contended for by appellants. Appellee's counsel assert, however, (p. 20 Appellee's Br.) that if our contention is correct, the United States would have gained nothing through its years of effort and large expenditures of money through its years of effort and large expenditures of money devoted to securing the decree. It is obvious that this is a misstatement. As a result of

the decree, the plaitiff obtained, among other, the following benefits, which could not have been obtained in any other manner:

1. The Upper Valley Users conceded priority to some 39,000 acres of Indian and White lands, a large part of which could never have been established upon a trial of the merits.

2. The Upper Valley Users limited themselves to the use of 6 acre feet per year on each acre of their land, although they then had an adjudicated right to use 9 acre feet.

3. The Upper Valley Users limited themselves to a total consumptive use of water for their entire project not to exceed 120,000 acre feet per year.

4. The government was permitted to carry out the Landowners' Agreement entered into with White settlers in the Lower Valley having rights junior to the Upper Valley Users, as set forth in Article VI of the decree.

5 Under the provisions of the decree, as agreed to, the Upper Valley Users can never receive an apportionment of water for their lands until an equivalent amount has run into the reservoir for the use of the plaintiff and the Lower Valley lands, and even then and after an apportionment has been made, the Upper Valley Users can only get it in the event it is available in the stream.

6. The Upper Valley Users limited their project to its size as o f 1924.

Counsel for Appellee further state (page 20 Appellee's Br.): "Nor can any cogent reason be given why the decree should describe the priorities of the United States so fully as it does in Articles V and VI, if in fact they were null." We do not now, nor never have contended that the priority schedule was null. However, in considering the purpose of that schedule in this decree, it must be remembered that this is an agreement as to the relative rights and priorities of the various individuals made parties to the decree. It is not simply a controversy between the Indian lands, on the one hand, and the Upper Valley Users, as a group, on the other. A priority schedule was essential in order to set down and identify the individual rights of all the various defendants, as between themselves, as well as identifying the rights of the government on the one hand, and the Upper Valley Users on the other. There was a further reason for having the priority schedule in that all of the users of water on the river were not made parties to this action, and it was essential that steps be taken to identify and preserve the rights of each individual litigant as against others who were not parties to the decree.

Appellee further takes the position that Article VIII, IX and X of the decree are of a different nature than the balance of it, those articles being what they term "consensual arrangements." We concede that these articles are consensual, but they are no different in their nature from any other portion of the decree. The entire decree

was a consensual arrangement. This is obvious from the preamble of the decree and the stipulation following it.

We cannot agree with the statement of counsel for Appellee (p. 21 Appellee's Br.) "that the terms of the compromise are set out in paragraphs 2 to 5" and that the first paragraph of Article VIII is in the nature of a preamble. The first paragraph of the article is the statement of the agreement of the parties with respect to the right of the Upper Valley Users to continue to use the water to the extent they had theretofore used it. What is set forth in the subsequent paragraphs of that article is merely the means and method of carrying the agreement into effect.

We can see no force to Appellee's argument (pp. 23-24 Appellee's Br.) to the effect that the Upper Valley Users derive a benefit from the San Carlos Act, because under its construction the plaintiff is limited in its use of the natural flow of the stream to an amount sufficient to propertly irrigate 80,000 acres. If this contention is correct, it means that the decree not only gave the plaintiff prior rights to the approximately 37,000 acres of Indian lands, but also to an additional 40,000 acres of White lands, the majority of which is conceded to be junior to the rights of the Upper Valley Users. Certainly no benefit comes to the Upper Valley Users from this construction.

Neither is there any force to the argument that the government's right to divert the natural flow of the